APPENDIX

APPENDIX

Exhibit A

Not For Publication Without the Approval of the Committee on Opinions

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1208-71

STATE OF NEW JERSEY, *Plaintiff-Respondent*

v.

MICHAEL J. STAVOLA, *Defendant-Appellant*

A-1235-71

STATE OF NEW JERSEY, *Plaintiff-Respondent*

v.

JOSEPH MARTINELLI, *Defendant-Appellant*,

Argued July 9, 1973—Decided Aug 3 '73

Before Judges MINTZ, LORA AND ALLCORN.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County.

Mr. Justin P. Walder argued the cause for appellant Michael J. Stavola (Messrs. Schapira, Steiner & Walter, attorneys; Mr. Jeffrey B. Cahn and Mr. Robert E. Knowlton, on the brief).

Mr. Paul J. Feldman argued the cause for appellant Joseph Martinelli (Mr. Charles Frankel, attorney.)

Mr. John DeCicco, Deputy Attorney General, argued the cause for respondent State of New Jersey (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney; Messrs. Robert E. Genatt, Leonard E. Pessin and Mart Varrsi, on the brief.)

PER CURIAM

At oral argument the court *sua sponte* ordered the consolidation of the above captioned appeals. Defendants appeal their convictions after a jury trial on an indictment returned by the State Grand Jury and filed May 17, 1971. The four count indictment charged defendants Stavola and Martinelli with:

I. Conspiracy (a) to induce Detective Sweeney of the State Police to corruptly intercede on behalf of defendant Stavola in a criminal prosecution then pending against Stavola, such intercession constituting misconduct in office, (b) to offer a bribe to Detective Sweeney, and (c) to obstruct justice with regard to the aforementioned criminal prosecution, all in violation of *N.J.S.A.* 2A:98-1 and 2A:98-2.

II. Attempting to induce Detective Sweeney to engage in misconduct in office by interceding on behalf of defendant Stavola in a criminal prosecution then pending against Stavola, in violation of *N.J.S.A.* 2A:85-1, 2A85-5, and 2A:85-14.

III. Offering a bribe to Detective Sweeney, in violation of *N.J.S.A.* 2A:85-1 and 2A:85-14; and

IV. Obstructing justice by endeavoring to persuade Detective Sweeney to corruptly intercede in the aforementioned prosecution, in violation of *N.J.S.A.* 2A:85-1 and 2A:85-14.

The jury was unable to reach a verdict on count I (conspiracy) as to both defendants, and as to count II (inducing misconduct in public office) as to defendant Stavola. Defendant Stavola was found guilty on counts III and IV. Defendant Martinelli was found guilty on counts II, III and IV. Stavola was sentenced to State Prison for one to two years on each of counts III and IV, but sentence was suspended on count IV. Martinelli was sentenced to one

to two years on each of counts II, III and IV, but sentence was suspended on counts III and IV.

The backdrop to this case is an indictment previously returned by the Monmouth County Grand Jury on September 1, 1970 against defendant Stavola for assault and battery upon a police officer and obstructing a police officer in the execution of his official duties. The indictment under which defendants were convicted on some of the counts, which are the subject of this appeal, concerns an alleged attempt by defendants to unlawfully influence the prosecution of the Monmouth County indictment.

Stavola makes the following contentions:

(1) The trial judge erred in failing to direct a verdict of acquittal as a matter of law on the basis of the defense of entrapment both before and after the case was submitted to the jury.

(2) The trial judge erred in refusing Stavola's requested charge that the jury may consider the actions of Martinelli as being the actions of an agent of the government with respect to Stavola's defense of entrapment.

(3) The trial judge erroneously and prejudicially limited the instruction on entrapment to the conspiracy count thereby denying Stavola his right to have the jury consider this defense as to all counts of the indictment.

(4) The issue of entrapment should have been treated as solely the province of the trial court and a judgment of acquittal should have been entered.

(5) The trial judge erroneously failed to properly instruct the jury that the State had the burden to prove beyond a reasonable doubt that Stavola was not entrapped into the commission of the offenses of which he was convicted.

(6) The trial judge erroneously refused to grant Stavola a judgment of acquittal on the bribery charges in count three.

(7) The trial judge erroneously refused to grant Stavola a judgment of acquittal on the charge of obstruction of justice in count four.

(8) The trial judge irreparably prejudiced Stavola by permitting improper examination of character witnesses.

(9) The trial judge prejudicially violated Stavola's Sixth Amendment rights to cross-examine and confront witnesses against him.

(10) Prejudicial error was committed when the jury was allowed to use transcripts of tape recorded conversations.

(11) The trial judge's charge to the jury was misleading, erroneous and incomplete.

(12) The prosecutor's summation was unduly prejudicial thereby denying Stavola a fair trial.

(13) Refusal of the trial judge to sever the trial of Stavola from that of co-defendant Martinelli irreparably prejudiced Stavola.

(14) The one to two year custodial sentence is manifestly excessive.

Martinelli makes the following contentions:

(1) Count two of the indictment fails to set forth a crime.

(2) The court's instruction on count two failed to advise the jury of the nature of the offense.

(3) The trial judge prejudiced defendant by permitting improper cross-examination of character witnesses.

(4) Numerous trial errors require a reversal.

(5) The custodial sentence is manifestly excessive.

(6) Entrapment.

The State's evidence may be summarized as follows: On October 5, 1970 Detective Edwin R. Fourre of the New Jersey State Police was at the Coach Restaurant in Union City. As he pulled into the parking lot he observed one Frank Mallamachi, whom he knew. He engaged in conversation with Mallamachi. Mallamachi then introduced Detective Fourre to Martinelli, who was also in the parking lot. During the course of conversation with Fourre, Martinelli explained that his employer at Trap Rock Industries, Michael Stavola, was in trouble, charged with assaulting a police officer. Martinelli asked Fourre whether he could help Stavola in any way. Fourre testified that he answered negatively. He reported the incident to his superior.

Detective James Sweeney of the State Police was the principal figure in the alleged attempt by the co-defendants to influence the prosecution of Stavola on the assault and battery indictment. Sweeney testified that he first met and spoke with defendant Martinelli in October 1970 when he and Fourre were at the Coach Restaurant. Sweeney was again at the Coach Restaurant on December 17, 1970. Martinelli approached him and began talking about his employer, Stavola. Martinelli characterized Stavola as one of the greatest guys he had ever met and a fantastic boss. He then said he was very sorry about the problem his boss was in, in Mommouth County. Martinelli said that if anyone could help Stavola get out of this problem, he could "write [his] own ticket." Martinelli stated that he would like Sweeney to meet Stavola, and if he could meet Stavola the following day for lunch, he should call Martinelli at one of two numbers.

The substance of the subsequent conversations between the co-defendants and Sweeney can best be obtained from the tapes. The transcripts of eight conversations were re-

corded on tape through the use of electronic surveillance equipment secreted on the person of Detective Sweeney and in his automobile. The transcripts were prepared by the State Police from the tapes. Portions of the tapes that were indiscernable were described as "inaudible" on the printed transcripts. After preliminary transcripts were prepared, Palmer Herbert, Captain of Detectives in the Ocean County Prosecutor's Office, listened to the tapes and inserted in certain of the "inaudible" spaces the words which he believed the context called for.

Sweeney testified that he called Martinelli at the Black Angus Restaurant on the evening of December 17, 1970. A tape of the conversation was played for the jury. Martinelli stated that he could not find Stavola, hence Sweeney should call again the next morning. A portion of the conversation as transcribed was as follows:

> MARTINELLI: No listen, if you could do something on that old buddy, I'll light a candle for you every morning.
>
> SWEENEY: Well.
>
> MARTINELLI: I'm going to try to set this up, you know on Rt. 1 there.
>
> SWEENEY: All right.
>
> MARTINELLI: You know what I'm talking about.
>
> SWEENEY: Yeah.

Sweeney called Martinelli the next morning, December 18, 1970, as planned. A tape of this phone call was played for the jury. As a result of that conversation Sweeney went on the afternoon of December 18, 1970 to the Carriage House Restaurant in North Brunswick. Sweeney met Martinelli in the cocktail lounge. Stavola was at the far end of the bar. After conversing for a time, Martinelli brought Sweeney to where Stavola was sitting, and introduced Sweeney to Stavola. Sweeney talked with Stavola in a hallway for a time, and Stavola then left. Sweeney thereafter continued his conversation with Martinelli.

The December 18, 1970 conversations were taped. In their preliminary conversation Martinelli told Sweeney that he told Stavola that he (Sweeney) was "with the confidential squad or something like that, (inaudible) you know your way around." Thereafter, in the course of the conversation of Sweeney with both Stavola and Martinelli, Stavola explained his version of the incident upon which the assault and battery indictment was based. He expressed the view that the complaining officer was lying, blowing the matter out of proportion, and that if that officer told the truth his problem would be resolved. He further stated that some influential person tried to intercede for him at the county level but that he did not ask him to do so. A further portion of the tape as transcribed is as follows:

> SWEENEY: * * * I can't promise you nothing, that's all I can say.
>
> STAVOLA: That's all you can say.
>
> MARTINELLI: Mike, Mike, I told him whatever it is let me know, you know what I'm talking about.
>
> STAVOLA: It's just half assed all the way down the line but it's gotten to the stage (laugh)
>
> SWEENEY: Look you've gotten to the stage right now where your (sic) going to have to do something.
>
> STAVOLA: All right.
>
> SWEENEY: Is it alright with you, with the arrangements I made with him then?
>
> STAVOLA: Whatever
>
> MARTINELLI: I told him whatever it is let me know.
>
> STAVOLA: Yeah.

No contact was made between Sweeney and defendants during the period from December 18, 1970 to January 7, 1971. Sweeney testified that on the latter date he received a telephone call from Martinelli. This call was not taped. Martinelli had just returned from Florida. He said he had called to determine what progress had been made in at-

tempting to help Stavola fix the case. Sweeney told Martinelli he was making progress. There were no conversations between Sweeney and either defendant during the period from January 7, 1971 to January 23, 1971.

Sweeney further testified that on January 23, 1971 he received a call from Martinelli but he told Martinelli that he could not talk at that time. Martinelli had wanted to know whether any more progress had been made in attempting to fix the case.

On February 12, 1971 Sweeney received a call at his home from Martinelli. Sweeney told Martinelli that things were looking good, and he requested a meeting with Martinelli and Stavola.

On February 23, 1971 Sweeney again received a call from Martinelli. This call was taped. During the course of this conversation Martinelli reveals for the first time an interest in personally benefiting monetarily from this deal. They agreed to meet later that day at the Carriage House.

A tape was made of the February 23, 1971 meeting between Sweeney and Martinelli at the Carriage House. This tape reveals that Martinelli and Stavola had "had words" around Christmas time because Martinelli had not received a Christmas bonus. Martinelli told Sweeney that the money would come from Stavola, Stavola knew this, and that Stavola had sent Martinelli to Sweeney. It should be noted also that there was testimony that Martinelli's employment by Stavola's company was terminated in December 1970.

Sweeney and Martinelli met again outside the Carriage House Restaurant on February 25, 1971. This conversation was taped. Martinelli appears to be prompting Sweeney to impress Stavola with the seriousness of the situation—"* * * say * * * the cops out there want to hang you Mike * * *,"—but this prompting again appears

to be the result of Martinelli's desire to jack the price up so that he and Sweeney could skim a profit out of the deal. This is apparent from the conversation between Sweeney and Martinelli at the outset of their meeting, at which time they discussed how much they could get away with charging Stavola.

Martinelli went into the Carriage House and returned with Stavola. Sweeney impressed Stavola with the seriousness of Stavola's situation—"* * * there's two things you got to worry about * * * number one you're an Italian, number two you're successful * * *;" "Your lawyers have probably told you this already, if found guilty, no less than 2, no more than 7 and a $2000 fine, that's what the statute reads." The remainder of the conversation between Sweeney and Stavola was not recorded, but Sweeney testified that Stavola asked him what it would cost and arrangements were made to meet the next day, February 26, 1971, at Holiday Inn in Princeton.

The February 26 meeting at the Holiday Inn was recorded. Sweeney and Stavola discussed the pay-off, the need for confidentiality, and "front money." During the course of the conversation Stavola, in an attempt to assure Sweeney that his word was good, implies that he had previously entered into a number of "deals," stating that he had performed different jobs and that "* * * they cross a few bucks here and there, it's a way of life and I'd rather have it, like with me and you * * *." A further portion of that conversation is as follows:

> SWEENEY: Well, the only thing that I suggested to them [the hypothetical recipients of the pay-off], and first of all they wanted too much and I'm gonna be honest with ya, so I told them this, the guy is not gonna put anything up front without a guarantee of something, the guy down there says well the guy isn't gonna move because they've been burned before.
>
> * * * * * * * * * *

STAVOLA: I couldn't begin to mention names to you, but all I got to say to you is that my word is my bond * * *.

SWEENEY: They said at least half * * *.

* * * * * * * * * *

STAVOLA: * * * they only know me as Mike Stavola and nothing else and I couldn't begin to tell ya of my other deals that I've had and other than my word is my bond, I'll tell ya, what I'll do with ya before I leave tonight I'll give you 5.

Sweeney and Stavola next met as planned on the evening of February 26, 1971 at the Colts Neck Inn. The conversation was recorded. Very little was said. It was clear from the conversation, however, that Stavola handed Sweeney $5000.

Stavola did not testify. However, Martinelli testified regarding his initial contacts with Fourre and Sweeney. He confirmed meeting with Fourre on October 5, 1970 in the parking lot of the Coach Restaurant and saying to Fourre: "Gee, I wonder why that thing can't be downgraded or anything like that. Do you know anything about things like that?"

Martinelli further stated that he first met Sweeney accompanied by Fourre on October 29, 1970 at the Coach Restaurant, and that Sweeney approached him when he was alone. He indicated that the conversation consisted of Sweeney's statement: "Gee, things like that are tough to get downgraded, but let me check into it. I'll see what it's all about."

Martinelli also said that he did not talk to or see Sweeney again until December 17, 1970 when Sweeney walked into the Coach Restaurant and Martinelli was sitting at a table. He said Sweeney started a conversation with him and stated that he had checked but nothing could

be done, Stavola was in a lot of trouble, and that he stood to get two to seven years because the offense was a "double felony." Martinelli said he responded by stating that, "If there is anything you feel you could do * * * he would really repay you." Martinelli testified that he did not tell Stavola that he met with Sweeney on the two above dates.

At the close of the proofs several motions were made by counsel for defendant Stavola in which defendant Martinelli joined. Defendant Stavola's motion for a judgment of acquittal on the ground that as a matter of law he was entrapped was denied. He renewed his motion made at the outset of the trial for a severance. Finally, defendant moved for dismissal of each of the separate counts of the indictment. The court denied the respective motions.

We will first consider the merits of defendant Stavola's appeal. Clearly his major contention is entrapment. In *State* v. *Dolce,* 41 *N.J.* 422, 430 (1964), the court stated:

> Entrapment exists when the criminal design originates with the police officials, and they implant in the mind of an innocent person the disposition to commit the offense and they induce its commission in order that they may prosecute. *Sorrells* v. *United States,* 287 *U.S.* 435, 442, 53 *S.Ct.* 210, 77 *L.Ed.* 413, 417 (1932). It occurs only when the criminal conduct was the product of the creative activity of law enforcement officials. *Sherman* v. *United States,* 356 *U.S.* 369, 372. 78 *S.Ct.* 819, 2 *L.Ed.*2d 848, 851 (1958).

To same effect see *United States* v. *Russell,* *U.S.* , 36 *L.Ed.*2d 366 (1973). This does not mean that police officials may not afford opportunities for the commission of criminal offenses. "Artifice and strategem, traps, decoys and deceptions may be used to obtain evidence of the commission of crime or to catch those engaged in criminal enterprises. Such devices are necessary weapons in the ever present war on crime and criminals." *Dolce,* at 431. When

a defendant interposes the defense of entrapment the State may present proof of his predisposition to commit the crime. The purpose of such evidence is to indicate that defendant was not an innocent person who would not have committed the offense were it not for the inducement of the police officers. Predisposition may be evidenced by prior conviction of crime, ready compliance with minimal inducement or easy yielding to the opportunity to commit the offense. *Dolce*, at 433.

Our review of the testimony impels the conclusion that the trial judge properly denied a judgment of acquittal and that the issue of entrapment was correctly left to the jury for determination. While the criminal design may have originated with Martinelli that design was clearly adopted by Stavola on December 18, 1970. *United States* v. *Klosterman*, 248 *F.*2d 191 (3rd Cir. 1957), relied upon by defendant, is factually distinguishable. In *Klosterman*, at 195, it appears that defendant abandoned his original criminal plan but "overzealous tactics of the law-enforcement agents * * * [created] a criminal out of a man who had abandoned his criminal intent * * * *" In such circumstances the court found entrapment as a matter of law. In the case before us there is no evidence indicative of Stavola's abandonment of his criminal design.

Nor do we find any merit in the contention that a judgment of acquittal should have been entered after the jury failed to find guilt on the conspiracy charge. Defendant may be found guilty for substantive offenses without a finding of guilt on the conspiracy count. *State* v. *Still*, 112 *N.J.Super.* 368 (App.Div.1970); *United States* v. *Allard*, 458 *F.*2d 1136 (3d Cir.1972).

Secondly, the contention that the trial judge erred in refusing to instruct the jury that it might consider Martinelli as the agent of the government with respect to the defense of entrapment lacks merit. The testimony clearly indicates that Martinelli originated the criminal design in

October 1970; he was not acting on behalf of the State Police. *Cf. United States* v. *Romano*, 278 *F.*2d 202, 204 (2nd Cir. 1960). Martinelli's criminal activity was adopted by Stavola no later than December 18, 1970, and was never thereafter abandoned by him. Hence the trial judge properly refused the requested instruction.

The charge on entrapment was given following the court's instruction on the conspiracy count. The court then proceeded to charge the jury on the remaining three substantive counts in the indictment. Defendant contends that this sequence in the instructions deprived him of his right to have the jury consider his defense of entrapment on all counts of the indictment. The entrapment charge was couched in general terms. Near the conclusion of its charge on entrapment the court stated:

> Now, entrapment can be proved during the State's case or the defendant can adduce evidence. It is raised by the defendant. And the issue of entrapment in this case is left to you for your determination as to each particular defendant in this case, Stavola and Martinelli. And the defendant is entitled to a verdict of not guilty unless the State has satisfied you beyond a reasonable doubt that the defendant committed the crime charged and he was not entrapped into doing so by police officials.

The defense of entrapment permeated the entire case. The acid test is whether the jury was misled by the charge which must be construed as a whole. *Moich* v. *Passaic Terminal & Construction Co., Inc.*, 82 *N.J.Super.* 353, 370 (App.Div.1964). In the circumstances here presented we do not believe that the jury was misled by the positioning of the entrapment charge.

While various code revision commissions and committees have suggested that the issue of entrapment should be decided by the court, the decisional law indicates that the

question is an issue to be decided by the jury. *Sorrells* v. *United States*, 287 *U.S.* 435 (1932); *United States* v. *Russell, supra.* In *State* v. *Dolce, supra*, at 433, the court in dictum indicated that the issue of entrapment is usually resolved by the jury "like any other defense," although it declined to rule on the question since it was not raised as a ground of appeal. We find no error in the submission of this issue to the jury.

The trial judge specifically charged the jury that as to each particular defendant, Stavola and Martinelli, that defendant is entitled to a verdict of not guilty unless the State "has satisfied you beyond a reasonable doubt that the defendant committed the crime charged and he was not entrapped into doing so by police officials." There is no merit to defendant's fifth contention.

The trial judge, contrary to defendant's assertion, properly refused to grant Stavola a judgment of acquittal as to the bribery charges in count three. Initially, he contends that the indictment failed to charge the common law crime of bribery. Suffice it to say that the indictment lists the essential facts constituting the offense charged. *R.* 3:7-3. The argument is devoid of merit. It is not necessary that the act requested be one which the official has authority to do. It is sufficient if he has *apparent* ability to bring about or *contribute* to the desired end. *State* v. *Begyn*, 34 *N.J.* 35 (1961); *United States* v. *Carson*, 464 *F.*2d 424 (2d Cir. 1972), *cert.* den. *U.S.* , 93 *S.Ct.* 268, 34 *L.Ed.* 2d 219 (1972). Finally, we find no error in connection with the bribery charge to the jury. It clearly explained the crime of common law bribery.

We likewise find no substance to defendant's contention that the trial judge erred in failing to grant a judgment of acquittal on count four of the indictment. Here, again, the sufficiency of the indictment is challenged. The indictment sufficiently described the acts committed by defendants, which constituted common law obstruction of justice

contrary to *N.J.S.A.* 2A:85-1. *State* v. *Cassatly*, 93 *N.J. Super.* 111, 118 (App.Div.1966), certif. den. 48 *N.J.* 448 (1967). Furthermore, the proofs fully supported the charge.

We reject defendant's eighth contention that the trial judge irreparably prejudiced Stavola by permitting improper cross-examination of the character witnesses. Assuming the impropriety of that cross-examination the trial judge emphatically gave a curative instruction to the jury to disregard the same, which completely precluded the possibility of prejudice to defendant. We note that one character witness was asked on cross-examination whether she had ever heard that Stavola was convicted in 1964 of obstructing elections. An objection was voiced to the question which was not answered. Out of the jury's presence the court ruled that because a certified copy of the conviction was not in court the question could not be asked. Now for the first time on appeal defendant argues that his conviction was reversed in a trial *de novo* in the County Court, a fact then obviously known to him. However, defendant did not advise the court of this fact, and did not request any curative instruction. He cannot take advantage of an error which he could readily have avoided at trial. *State* v. *Macon*, 57 *N.J.* 325 (1970).

We do not find that the cross-examination of Sweeney was unduly curtailed. Many of the questions propounded to Sweeney were irrelevant or disallowed by the trial judge pursuant to his discretion under *Rules of Evidence* 4.

Defendant contends that prejudicial error was committed when the jury was permitted to use transcripts of tape recorded conversations. The transcripts were not introduced into evidence. Rather they were distributed to the jury, as visual aids. The court reiterated several times to the jury in the course of the trial that the tapes were the evidence, that the transcripts were only aids, and that the jurors were to decide for themselves what was said on the tapes. The use of such transcripts is within the discretion

of the trial judge, and we fail to perceive any abuse of such discretion. *State* v. *Armellino*, 122 *N.J.Super.* 225, 239 (App.Div.1973).

Defendant argues that the trial judge's charge to the jury was misleading, erroneous and incomplete. In this connection he asserts that the charge on entrapment was erroneous. It was not. It properly and adequately set forth the law enunciated in *State* v. *Dolce, supra.*

Although the trial judge stated that he would instruct the jury that the State's witnesses were not on trial, and whether they were in fact guilty or innocent was not an issue but that credibility was, he failed to give such instruction. Nevertheless, during the course of his charge he told the jury that the resolution of the credibility of the witnesses was its function. We deem this general instruction on credibility entirely adequate, and that it was unnecessary to charge that the State's witnesses were not on trial. Obviously they were not.

Furthermore, we cannot fault the trial judge on his instruction to the jury respecting testimony of defendant's character or reputation. It was adequate and proper.

Defendant contends that the trial judge erred in failing to charge the jury concerning the sentencing requirements with respect to a conviction for assault and battery upon a police officer. Sweeney, in his conversations with defendants, exaggerated the extent of the sentence which Stavola would be exposed to on a conviction for assault and battery upon the police officer. While the trial judge failed to charge the jury the statutory sentencing limit on such a conviction, he did instruct the jury that sentencing was a matter for the court to impose. Furthermore, as earlier noted herein, traps and deceptions may be used to obtain evidence of the commission of crime or to catch those engaged in criminal enterprises.

On several occasions during the trial the court instructed the jury that the conversations between Martinelli and Sweeney could only be used as evidence against Stavola if it was first determined that a conspiracy existed. In the course of his charge to the jury he briefly again alluded to this principle of law. In these circumstances we are satisfied that the jury was fully apprised of the appropriate rule.

We have considered the several other objections to the charge taken by defendant as set forth in his brief and find that they are devoid of merit. The charge when viewed in its entirety properly instructed the jury on the applicable law in light of the understanding that would be derived by ordinary men and jurors in relation to the evidence before them and the circumstances of the trial. *State* v. *Janiec,* 11 *N.J.* 397, 401 (1953).

We do not agree with defendant's contention that the prosecutor's summation was unduly prejudicial. We concur with the prosecutor that his plea for vindication of Sweeney, the reference to Sweeney being "on trial" and his statement that he was in a sense "defense counsel" were merely a reference to the conflicting testimony and a plea that Sweeney's, rather than the defense witnesses', was the testimony to be believed.

Defendant asserts that the prosecutor in his summation took the $5,000 which was in evidence, slipped it into his pocket while talking about dealing with the police and referred to the fact that if Sweeney had been a corrupt policeman he could have kept the same. Defendant argues that the court may take judicial notice that at the time of trial the news media widely publicized reports concerning police corruption as revealed by the Knapp Commission in New York City, and it was against this background that the prosecutor made this remark. Following summation a motion for a mistrial, based upon this statement was

made, and properly denied. One of the basic issues in the case was the charge of bribery. Furthermore, both defense counsel in summation attacked Sweeney's honesty and integrity. In these circumstances we believe that this comment by the prosecutor was within the bounds of fair comment. *Cf. State* v. *Knight*, *N.J.* (1973).

We further find that the comment of the prosecutor regarding his role was entirely proper. In brief, the prosecutor's summation did not exceed the bounds of fair comment on the evidence.

Stavola had been denied a pretrial motion for severance, and several such motions were made and denied during the trial. As a consequence Stavola urges that he suffered irreparable prejudice.

In this respect he refers to the summation of Martinelli's counsel wherein he made reference to the fact that Martinelli testified in his own behalf, and that such a reference unfairly raised in the jury's mind the fact that Stavola did not take the stand. However, the state contends that this remark was directed solely to the credibility of Martinelli. We do not believe that it in any way reflected on Stavola's decision not to testify. Stavola has failed to demonstrate that his right to remain silent has been violated. *State* v. *Sinclair, et al*, 49 *N.J.* 525, 548, 549 (1967).

The granting of a motion for severance is discretionary with the trial court. Denial of such a motion will not warrant a reversal unless it is clearly shown that the trial court's action constituted an abuse of discretion. *State* v. *Yormark*, 117 *N.J.Super.* 315, 331-332 (App.Div.1971), certif. den. 60 *N.J.* 138 (1972), *cert.* den. 407 *U.S.* 925 (1972). Here, as in *Yormark*, the conspiracy and the substantive charges against Stavola and Martinelli arose out of the same criminal transaction. The court was careful throughout the trial to instruct the jury, where appropriate, that evidence could only be used against one or the other de-

fendant. We find no abuse of discretion on the part of the trial judge in the denial of the several motions for a severance.

Finally, we have reviewed the presentence report, and are mindful of Stavola's prior clean record. Nevertheless, the offenses for which he was convicted are reprehensible. We find no abuse of discretion on the part of the trial judge in imposing a custodial sentence for the stated term. It was not manifestly excessive.

Martinelli's contention that the indictment pertaining to count two, attempting to induce misconduct in office, fails to set forth a crime, is frivolous. The duties of Detective Sweeney and defendant's attempt to induce Sweeney to intercede in Stavola's behalf in connection with the pending prosecution against Stavola are adequately detailed in that count. *Cf. State* v. *Cohen*, 32 *N.J.* 1 (1960). The proofs abundantly supported this charge.

We have examined the trial court's instructions regarding count two, and the charge in its entirety, and conclude that it properly informed the jury of the nature of the offense.

Martinelli relies upon Stavola's brief in urging that numerous trial errors mandate a reversal. As already noted, we have found to the contrary.

Some of his contentions regarding improper cross-examination of character witnesses were considered by us in the Stavola appeal and need not here be repeated. Additionally, he argues that a character witness was asked whether he had ever heard that Martinelli offered to be a "bag man". The question was improper, and the objection to the same sustained. The court further instructed the jury that the questioning pertaining "to this alleged crime" was improper, and that it should be disregarded. This curative instruction alleviated any prejudicial error in

connection with the improper cross-examination of character witnesses.

Finally, we have reviewed Martinelli's presentence report and find no prior criminal record. We make the same observations here as we did in connection with Stavola's custodial sentence. Martinelli's custodial sentence on the three counts was not manifestly excessive.

The convictions of defendants Stavola and Martinelli are affirmed.

A True Copy

MORTIMER G. NEWMAN, JR.
Clerk

EXHIBIT B

SUPREME COURT OF NEW JERSEY

C-117 September Term, 1973

STATE OF NEW JERSEY, *Plaintiff-Respondent,*

v.

MICHAEL J. STAVOLA, *Defendant-Petitioner*

On Petition for Certification

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied.

WITNESS the Honorable Pierre P. Garven, Chief Justice, at Trenton on the 2nd day of October, 1973.

/s/ FLORENCE R. PISKOE
Florence R. Piskoe
Clerk of the Supreme Court

EXHIBIT C

SUPREME COURT OF THE UNITED STATES

No. A-622

MICHAEL J. STAVOLA, *Petitioner*

v.

NEW JERSEY

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 15, 1974.

/s/ WILLIAM J. BRENNAN, JR.
William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 20
day of December, 1973.

EXHIBIT D

Tape Recorded Conversation February 23, 1971

MARTINELLI: Mike, you met Jim.

STAVOLA: Yeah.

SWEENEY: Mr. Stavola, how are you?

STAVOLA: Pretty good.

MARTINELLI: They're screwing up the works with Traffic for Christsakes its a State Trooper.

SWEENEY: Yeah, I know.

Unidentified male: (*inaud*) should bring this car (*inaud*)

STAVOLA: (*Inaud*) pull right here until he gets out.

SWEENEY: He's right behind us.

STAVOLA: Oh.

MARTINELL: You been working late.

SWEENEY: I told you, I been in the office all week and tonight we had a meeting and I had to go up to New Brunswick station and drop the guys checks off, today's pay day.

MARTINELLI: Oh.

MARTINELLI: You want me to start the conversation?

SWEENEY: (*Inaudible*)

MARTINELLI: Mike, I trust him, he trusts me, he wants to know if he can trust you, you want to know if you can trust him. Jim is all right, I can tell you that, I'll take full responsibility, anything you want to talk about, you talk about it.

SWEENEY: Let me say this on the out set Mr. Stavola, it's nothing personal at you when I say, I don't trust you, understand what I'm saying now.

STAVOLA: Yeah.

SWEENEY: It's nothing I have against you personally but, I got a lot to lose and so do you, really, you know, if we were ever found out about this shit but ah, Joe, came to me and he was speaking for you, I've done this so far I've gotten to somebody within the confines Monmouth County Court House system and the thing that can be worked, first of all let me say this to you, Joe McCarthy

and the cop cannot be touched, number two they got a hard on for you, number three, the town has got a hard on for you, from what I could find out.

MARTINELLI: Fucking papers don't do any good either.

SWEENEY: Yeah, theres two things you got to worry about one is a jury, number one you're an Italian, number two you're successful and they put two and two together right away and as I understand it the guy that was going to handle the prosecution was gonna go on this theme, in other words ah, attack your character so to speak.

STAVOLA: Right.

SWEENEY: A deal can be made through the first individual who I'm not going to tell you who he is, I want that understood too, that there can be a specific prosecutor to handle your case before a specific judge you do definitely have to stand trial, there is no way in hell because of the guy that wrote the complaint and now has been presented before grand jury, that you can get out of a court trial, it's not an impossibility. But if it was done that way, the Attorney General would be down, right down the prosecutor's neck, the prosecutor's neck and he would not stand for it, so it's gotta be done in that way, you're gonna have to stand the trial. Your lawyers have probably told you this already, if found guilty, no less than 2, no more than 7 and a $2,000 fine, that's what the statute reads.

STAVOLA: Okay.

MARTINELLI: (*inaud*) know anything about this?

SWEENEY: Well, that's another thing, your lawyer doesn't know anything if you agree to this.

MARTINELLI: If they win the case Mike, let them feel that they won it, you know what I mean.

SWEENEY: He does not get wind of this at all, that's got to be one of the stipulations, or else I get, I'll leave right now.

MARTINELLI: No, no, no ah look ah, you talk to this out. Hey, Mike if you feel, if you feel this is no good, say look, I want no part of it, if you think it's something good, don't

be afraid to talk about it. Jim's all right, that's all I got to tell you. You want me to walk out of here and the two of you talk?

MARTINELLI: Mike, it's up to you.

SWEENEY: Maybe it'd be better, Joe.

MARTINELLI: Yeah.

MARTINELLI: All right.

STAVOLA: Mart, you sit there, we'll take a walk.

MARTINELLI: Close your door, close your door Jim. Pause approximately 12 minutes

STAVOLA: (*Inaudible*) we'll walk.

SWEENEY: Joe, talk it easy.

MARTINELLI: All right.